

APPEAL NO. 010157

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 28, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on February 2, 1996, with an impairment rating (IR) of 5%, as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) in his 1997 report. In his appeal, the claimant contends that the hearing officer erred in determining that the designated doctor's amended report was not entitled to presumptive weight because the amendment was not made within a reasonable time. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the carrier accepted liability for a _____, compensable injury and that Dr. D was selected by the Commission to serve as the designated doctor. Dr. D examined the claimant on March 3, 1997, for the purpose of determining whether the claimant had reached MMI and, if so, to assess his IR. In a narrative report dated April 29, 1997, Dr. D stated that the claimant reached MMI on September 3, 1997, with an IR of 5%, for a specific disorder of the lumbar spine under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In his narrative report, Dr. D noted that the claimant complained of left knee pain and that the claimant had undergone anterior cruciate ligament (ACL) reconstruction surgery on October 9, 1996, for which he was "still in the convalescent period. . . ." However, Dr. D further stated that "his knee was not involved in the work related injury as he describes to me" and that "the knee injury is inconsequential to the work related injury so therefore it is not rated." On May 29, 1997, Dr. D completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on September 3, 1997, with an IR of 5%. The Commission contacted Dr. D's office to advise him that his date of MMI was invalid because it was prospective. Dr. D's office advised the Commission that the September 3, 1997, was certified in error and that Dr. D had intended to certify that the claimant reached MMI on September 3, 1996. On December 16, 1997, the Commission received an amended TWCC-69 from Dr. D changing the date of MMI from September 3, 1997, to September 3, 1996.

On April 1, 1998, the Commission received a letter of representation from the claimant's attorney. On July 17, 1998, the claimant's attorney sent a letter to the Commission noting that the left knee had been accepted by the carrier as part of the compensable injury and asking that the Commission send a letter of clarification to the designated doctor asking him to reconsider the claimant's MMI date and his IR in light of the fact that the left knee was part of the compensable injury. On November 4, 1998, the

claimant's attorney hand delivered a copy of the July 17, 1998, letter requesting clarification to the Commission, apparently because the earlier letter had not been acted upon and could not be located in the file. On December 2, 1998, the Commission advised the claimant's attorney that it was not appropriate to send a letter of clarification and that he needed to file a Request for Benefit Review Conference [BRC] (TWCC-45), which the claimant's attorney did on that same day. At that point, the Commission scheduled a BRC for December 21, 1998, and a letter of clarification was forwarded by the benefit review officer (BRO) to Dr. D. Thereafter, the process failed to work properly and despite the fact that the designated doctor requested to reexamine the claimant in March 1999, the reexamination was not scheduled until January 20, 2000. After he reexamined the claimant, Dr. D amended his report, certifying that the claimant reached MMI on February 6, 1998, by operation of Section 401.011(30)(B), with an IR of 27%, which was comprised of the 5% for the lumbar spine and 23% whole person for loss of range of motion in the left knee and diagnosis-related ratings for a double meniscectomies, chondromalacia, and ACL loss.

We have long recognized that a designated doctor may amend a certification of MMI and IR if he does so for a proper purpose and within a reasonable time. Texas Workers' Compensation Commission Appeal No. 000138, decided March 8, 2000; Texas Workers' Compensation Commission Appeal No. 972233, decided December 12, 1997. In this instance, there is no dispute that Dr. D's amendment of his IR to include a rating for all of the compensable injury was made for a proper reason. There is also no dispute that Dr. D's amended report was made in compliance with the AMA Guides. Thus, the issue in this case is whether the amendment of the designated doctor's report was made within a reasonable time. The question of what constitutes a reasonable time for a designated doctor to amend his report is a question of fact and the period of time that will be considered reasonable may well vary from case to case according to the facts of a given case. Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994; Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000; Texas Workers' Compensation Commission Appeal No. 000802, decided May 22, 2000. The hearing officer determined that the 34-month delay after the initial examination, and the 30-month delay after the Commission received the designated doctor's initial report was too long to constitute a reasonable time for the amendment of the designated doctor's report. The hearing officer noted that "a significant portion of the delay was from the inaction of the Claimant." The hearing officer cited Texas Workers' Compensation Commission Appeal No. 000203, decided March 20, 2000, and noted that the "proper focus was not simply the elapsed time between the first and the amended reports"; rather, it required an analysis of the significant events that occurred during the delay to see "what circumstances existed that might have had a bearing on the claimant's actions to obtain an amended report." That is, in determining whether an amendment was made in a reasonable time, the primary consideration is not on the total elapsed time but instead on the amount of that time that can reasonably be attributed to the party seeking to have the Commission give presumptive weight to an amended report. Although the hearing officer articulated the correct analysis, it is not apparent that he applied it. As noted above, there was not a valid certification from Dr. D until December 1997 because

until that date he had certified a prospective date of MMI. By July 17, 1998, the claimant's attorney had requested that a clarification letter be sent to the designated doctor advising him that the claimant's left knee was part of the compensable injury and asking him to consider the claimant's left knee in determining the date of MMI and assigning the IR. That request was mishandled by the Commission; however, by December 21, 1998, the claimant's attorney got a BRC set and the BRO sent the first letter of clarification to Dr. D. As noted above, the delay between December 21, 1998, and Dr. D's January 20, 2000, amendment of his report is largely attributable to the Commission. In this case, only 7 to 12 months of the delay in obtaining the amendment is reasonably attributable to the claimant, specifically the period between when a valid certification was finally made by Dr. D in December 1997 and the date when the claimant's attorney sought and the Commission sent the initial letter of clarification to Dr. D asking him to consider and rate the claimant's left knee. Under these circumstances, we believe that any determination that the amendment was not made within a reasonable time would be so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on September 3, 1996, with an IR of 5% in accordance with Dr. D's initial report and render a new decision that the claimant reached MMI on February 6, 1998, with an IR of 27%, as Dr. D certified in his amended report.

The hearing officer's decision and order are reversed and a new decision rendered that the claimant reached MMI on February 6, 1998, with an IR of 27%.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge